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NO._____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

ALABAMA BOARD OF PARDONS AND
PAROLES, EALON M. LAMBERT, JOHN
THOMAS PORTER, and RAY MORROW,
Members of the Board of Pardons
and Paroles of the State of
Alabama, and the
STATE OF ALABAMA,

PETITIONERS,

vs.

RICHARD MARK ELLARD,

RESPONDENT,

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

OF

DON SIEGELMAN
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

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EDITOR'S NOTE

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## QUESTIONS PRESENTED

The Alabama Board of Pardons and Paroles, the members thereof, and the State of Alabama, Petitioners, respectfully pray that a writ of certiorari issue to the Honorable United States Court of Appeals for the Eleventh Circuit to review the following questions:

1. Where a state convict is serving concurrent life sentences from two states in the prisons of one state and is then issued a parole, which has no effect on the prisoner or his sentences, except to transfer him to the other state's prisons, does such a parole create any constitutionally pro-tected liberty interest?

2. To what extent do state parole statutes, as authoritatively interpreted by state courts, control the nature of

state paroles and the validity of a given parole and to what extent are state court interpretations of such statutes binding on the federal courts?

## THE PARTIES

In the United States District Court for the Middle District of Alabama and the United States Court of Appeals for the Eleventh Circuit, the parties were: The Petitioners herein, to wit, the State of Alabama, the Alabama Board of Pardons and Paroles and the members thereof, and the Respondent herein, to wit, Richard Mark Ellard.

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OPINIONS AND ORDERS BELOW

The opinions and orders of the United States District Court for the Middle District Court of Alabama are not reported but are submitted as Appendix "A" to this petition.

The opinion and orders of the United States Court of Appeals for the Eleventh Circuit are reported as follows:

Ellard v. Alabama Board of Pardons and Paroles, 824 F.2d 937 (11th Cir, 1987)

and

Ellard v. Alabama Board of Pardons and Paroles, ___ F.2d ___ (11th Cir, Sept. 24, 1987)

The same are submitted as Appendix "B" to this petition.

## JURISDICTION

The decision of the United States Court of Appeals was issued August 19, 1987; your petitioners' application for rehearing, suggesting in banc consideration, was denied on September 24, 1987. The mandate is now stayed until November 24, 1987, or until the dispostion of this petition. See Appendix "B".

This Honorable Court's Jurisdiction is invoked under Title 28, Section 1254(1), United States Code.

CONSTITUTIONAL PROVISIONS INVOLVED

At issue in this case is an Alabama Parole which caused the Respondent, who had been serving concurrant Alabama and Georgia life sentences in Alabama's prisons, to be transfered to Georgia's prisons to continue serving the sentences there; the issue is whether such a parole created a liberty interest within the meaning of Section 1 the Fourteenth Amendment to the Constitution of the United States, relevent language reading:

> "... Nor shall a state deprive any person of ...liberty... without due process of law..."

STATUTORY PROVISIONS INVOLVED

At issue in this case is whether the

United States Court of Appeals was authorized to reject the State Court construction of Alabama's parole statutes. These statutes are voluminous and are set out in Appendix "C".

## STATEMENT OF THE CASE

Alabama law provides for parole is the case of most prison sentences. See the statutes set out in Appendix "C". The decision to parole is entirely withing the descresion of the Board of Pardons and Paroles, and, therefore, the statutes create no liberty interst in being paroled. Thomas v. Sellers, 691 F.2d 487 (11th Cir, 1983), cited with approval for this proposition by the panel in this case, Ellard v. Board, 824 F.2d 937, 942 (11th Cir, 1987). However, the Board's descresion in granting paroles is severly restricted by the state statutes. Before it is authorized to grant any parole the Board must

obtain, "...a complete statement of the crime...", for which the prisoner was sentenced, which is to include, "...the circumstances of such crime...." (15-22-25 Code of Alabama, 1975; Appendix "C".) The Board is also to obtain any available reports of the prisoner's "...mental and psychiatric condition and history...." (Ibid) and a "...complete criminal record of such prisoner...." (Ibid)

Having amassed this data, the Board in its discretion may conditionally release to the free world a parolable prisoner, who is not subject to detainer, if the Board determines that there is a reasonable probability that the prisoner will live "... at liberty without violating the law and that his release is not imcompatible with the welfare of society...." 15-22-26; Appendix "C". The Board must also be satisfied that the

prisoner will be suitably employed in self sustaining employment and will not become a public charge. §15-22-28(d); Appendix "C".

Alabama prisoners, who are subject to detainers may be paroled to the detainers. However, if such a prisoner satifies all of his detainers before completing his Alabama sentence, he may not be released from custody without an appropriate order from the Board. Section 15-22-24(i); Appendix "C".

The nature of an Alabama parole is set out in Section 15-22-26, Code of Alabama, 1975:

> "...If the board shall so determine, such prisoner shall be allowed to go upon parole outside of prison walls and enclosure upon such terms and conditions as the board shall prescribe, but to remain while thus on parole in the legal custody of the warden of the prison from which he is paroled until the expiration of the

maximum term specified in his sentence or until he is fully pardoned..." (Appendix "C")

The duties of the Board are mandatory, but its powers are strictly construed. Section 15-22-38; Appendix "C". A member of the Board who knowingly or willfully neglects or fails to perform as required, commits a felony. Section 15-22-39; Appendix "C". Any parole granted contrary to the provisions of the statutes, is null and void. Section 15-22-40; Appendix "C".

Prior to March 2, 1981, the Respondent, Richard Mark Ellard, was serving concurrent Alabama and Georgia life sentences for two different murders. He was serving these sentences in Alabama's prisons. On March 2, 1981, the Board issued a certificate of parole to Ellard, which placed Ellard in the custody of the State of Georgia, to

continue serving his Alabama and his Georgia sentences in Georgia prisons. Since Ellard was being transferred to Georgia's prisons, no provision was made for him to maintain employment or report to a parole supervisor, but he was required to report to the Board, if he was ever released by Georgia. Pursuant to the parole, he was transferred to Georgia's prisons to continue serving both states' sentences there. (R. Vol. I, D.5, R.Ex.A, pp. 22-23)

Within weeks of the parole, it became apparant that the Board may not have had before it the materials required by the Alabama statutes before any parole may be issued, when it issued the Ellard parole. The Board ordered an investigation and, when this investigation revealed gross deficiencies in the

materials before the Board[1], the Board obtained temporary custody of Ellard from Georgia in order to hold hearings in accordance with Morrisey v. Brewer, (408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 [1972]). After such hearings, the Board nuffified the parole. Respondent Ellard was then returned to Georgia's prisons to continue serving both of his sentences there, and he remains there and will remain there until and unless Georgia moves to release him.[2] (R. Vol. I, D.5, R. Ex "A," pp 2-10)

Respondent Ellard obtained review of the Board's action by a civil action in

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[1]See Appendix "E". Compare parts I, II and III with part IV. These deficiencies will be outlined in the Statement of the facts.

[2]It is an undeniable fact that Ellard's situation before the nullification and his situation thereafter were identical. For this reason the State of Alabama has argued throughout this litigation that Ellard's claim is moot.

the nature of common law certiorari in the Circuit Court of Montgomery County, Alabama. On August 31, 1983, the Circuit Court, after reviewing the records of the Parole Board, affirmed the Board's action in nullifying the parole. Circuit Judge H. Mark Kennedy wrote in part:

> "...In the instant case which is before this Court for review, it is apparent from the record that at the time Ellard's parole was granted, the Board did not have before it a complete investigative file on the inmate's social and criminal record. For that reason, at the time of issuance, the Board was in violation of §15-22-25(b) of the Code of Alabama.
>
> "Due to the strict construction and mandatory limitations and restrictions language in §15-22-38, the Board is required by law to follow the explicit statutory scheme in performing its functions as parole grantor.

"It is the opinion of this Court that the Alabama Board of Pardons and Paroles failed to fulfill its statutorily mandated function in the issuance of the Ellard parole and for that reason and pursuant to §15-22-40, the parole issued to Ellard was void ab initio..."

(R.Vol.I, D.5, R.Ex. "B", p.3,; emphasis supplied; Appendix "D", pages 103-104)

Ellard appealed to the Court of Criminal Appeals of Alabama, which on June 8, 1984, affirmed the Circuit Court's judgment. (Ellard v. State, 474 So.2d 743 [Ala. Crim. App. 1984]). The Court of Appeals agreed with the Circuit Court that the Board had not complied with the statutory mandates, with the result that the parole was void. (447 So.2d 743, 751-752) However, the Court of Appeals went further and found that the parole was also defective in that:

"...It is apparent from the face of the record that Ellard

did not have suitable employment in self-sustaining employment, and was not free from being a public charge, which are mandatory requirements before parole can be granted. ..." (474 So.2d 743, 752)

Finally, the Court of Appeals ruled that the parole issued to Ellard was nothing more than a conditional interstate prison transfer. The Court wrote:

"...There is no statutory provision specifically authorizing the Board to parole a prisoner to a detainer. If the Board desires to release a prisoner to another state for the purpose of serving a sentence in that state, it is apparent that the proper method is by conditional transfer

under § 15-22-24(i).[3] If the Board in the instant case sought to grant Ellard more than a conditional transfer, its action was in violation of the statute and was void. Regardless of how the Board characterized its action, Ellard obtained nothing more than a conditional interstate transfer. ..." (474 So.2d 743, 753)

Respondent Ellard then sought and was granted review in the Alabama Supreme Court. The State Supreme Court did not

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[3] Section 15-22-24(i) reads:

"(i) The board shall have the power, authority, and jurisdiction to conditionally transfer a prisoner to the authorities of the federal government or any other jurisdiction entitled to his custody to answer pending charges or begin serving a sentence in response to a properly filed detainer from the other jurisdiction. Such conditionally transferred prisoner shall remain in the legal custody of the warden of the institution from which he was transferred. Should any such conditionally transferred prisoner satisfy all detainers against him prior to completion of his Alabama sentence, said prisoner shall not be released from custody without further order of the board of pardons and paroles." (See Appendix C; emphasis supplied)

question anything in the lower courts' opinions but decided a broader question: Whether the Alabama Board of Pardons and Paroles is authorized to revoke an erroneously issued parole. (Ex parte Ellard 474 So.2d 758 [Ala, 1985]) Obviously, a parole issued in violation of the statutes and which is for that reason void, would, at a minimum, be an erroneously issued parole. The Alabama Supreme Court decided the issue in the affirmative, but held that the parolee had the right to due process.[4] The State

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[4]In applying its rule of law to this case, the Supreme Court wrote:

> "...Although Ellard did not have a constitutionally protected liberty interest, nevertheless, we recognize that Ellard was entitled to a due

(cont. next page)

Supreme Court affirmed the lower court's rulings.

Respondent Ellard then sought review by a petition for a writ of habeas corpus in the United States District Court for the Middle District of Alabama, under 28 U.S.C, Section 2254. (R. Vol. I, D.1; Appendix "A".) On May 29, 1986, the

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[4]Continued from page 14:

> process hearing. ..." (474 So.2d 758, 760)

If the Court was applying Federal Constitutional law here, it was wrong. Connecticut Board v. Dumschat, 452 U.S. 458, 69 L.Ed.2d 158, 101 S.Ct. 2460 (1981); Jago v. Van Curen, 454 U.S. 14, 70 L.Ed.2d 13, 102 S.Ct. 31 (1981) If the Court was applying Alabama law, then its ruling is binding as a matter of state law, but the State Supreme Court's finding that Ellard was accorded due process, immediately following the above quoted language is equally binding.

District Court denied the writ on the grounds that Ellard had no liberty interest in the parole and therefore no due process rights. (R. Vol. I, D 1, pp. 23 & 24, Appendix "A") The finding that there was no liberty interest was based on the following findings by the Magistrate, which were adopted by the District Judge.

> "... At the outset, the Magistrate finds that the evidence unquestionably demonstrates that during the period of time involved, Richard Mark Ellard has never been free of prison environments, either in Alabama or in Georgia. When Alabama granted its parole, Ellard did not enter the free world weighted only with parole conditions. When he went to Georgia, he went into the Georgia prison system and again was not priviledged with free-world freedom which is one of the purposes of parole. ..." (Vol. I, D. 20, p. 4 Appendix "A", p. 15)

And,

> "...Ellard's contention of possible freedom in the future, if Georgia paroles him, since Alabama has already paroled him is farfetched and meritless. ..."(Ibid, p.6); Appendix "A", p. 19)

The District Judge wrote:

> "...Where, as here, the Petitioner has not received any liberties because of the parole and the possibility of future liberty is purely speculative, this Court is not of the opinion that a liberty interest is at stake. ..." (Vol. I, D.23, p.2; Appendix "A", p. 6)

From the District Court's order denying the writ, appeal was prosecuted to the United States Court of Appeals for the Eleventh Circuit. On August 19, 1987, a divided panel of the Court of Appeals reversed the District Court's order. Ellard v. Board, 824 F.2d 937 (11th Cir. 1987); Appendix "B".

Where the District Court had found that Respondent Ellard had no constitutionally protected liberty

interest, since the parole never effected his release to the free world, two judges of the Court of Appeals found a liberty interest on the basis that: (1) liberty interest is a matter of form, so that anything called "parole" creates a liberty interest. "...[words and form] are the essence of a substantive liberty interest created by state law. ..." (824 F.2d 937, 943; Appendix "B", page 38) (2) Although Ellard was never released to the free world, he was released from the physical custody of Alabama's prisons (note 4, 824 F.2d 937, 943; Appendix "B", page 40) (3) The Alabama Supreme Court had ruled that Ellard had the right to a due process hearing, (See note 4, pages 14-15, above). (824 F.2d 937, 944)

Ellard's claim that, if the parole had remained in effect, he would have been released, if Georgia had ever paroled him, had been rejected by the

State Courts on the grounds that Alabama law did not authorize such an abdication of responsiblity by the Alabama Parole Board. See pages 12-13, above. The District Court found as facts that this claim was "...farfetched and meritless... ." and "...purely speculative... ." See page 17, above. Yet, the Court of Appeals in a footnote adopted the legal and factual basis of Ellard's claim. (Note 6, 824 F.2d 937, 944, Appendix "B", page 42)

Finally, the heart and soul of the Court of Appeals opinion was a determination that, once a state created anything called "parole," the questions of the nature of parole, the meaning of parole statutes, the circumstances under which a parole may be revoked and the validity of state parole are all matters of Federal Constitutional Law. On the

basis of such a determination, the Court of Appeals proceeded to revise on a wholesale basis the interpretation of the Alabama statutes and on almost every point reject the State Court interpertation. For example: As noted in the preceding paragraph, where the State Courts ruled that the Parole Board was not authorized to abrogate its authority in paroling a prisoner into the custody of another state, the Court of Appeals, ignoring § 15-22-24(i); note 3, page 13), above, found that this was the necessary effect of an Alabama parole. Many of the gross deficiencies in the materials before the Board at the time of the parole, which the State Courts found to render the parole void ab initio as a matter of state law (See page 11, above), the Court of Appeals found to be mere details, the lack of which did not violate state law (824 F.2d 937, 948-949,

Appendix "B", pages 65-68) In remanding the cause to the District Court, the Court of Appeals did not limit the issues to be decided to whether Ellard had been accorded proceederal process incident to the nullification of the parole and whether there was substantial evidence in support the State Court findings, but ordered the District Court to review the reletive merits of the state determination. (824 F.2d 937, 949, Appendix "B", page 68)

Judge Fay submitted a vigorous dissent. (824 F.2d 937, 949; Appendix "B", pages 68-70)

Your Petitioners applied for rehearing, suggesting in banc consideration, but the same was denied on September 24, 1987. The mandate is now stayed November 24, 1987. (Appendix "B", pages 80-82)

## STATEMENT OF THE FACTS

I.

IN RE: LIBERTY INTEREST

It is undisputed that the parole transferred Respondent Ellard from Alabama's prisons to Georgia's prisons but never effected his release to the free world nor changed the rate at which he served his concurrent life sentences. This has been found as a fact by every Court which has reviewed this case including the U. S. Court of Appeals.

II.

IN RE: THE DEFICIENCY IN THE MATERIALS BEFORE THE BOARD AT THE TIME OF THE PAROLE

The following deficiencies in the materials before the Board at the time of the Parole were found by the State Courts to be such a departure from state law as to render the parole void. The U. S.

Court of Appeals held many of them to be mere details which did not violate state law.

A. Under the Board's duty to obtain a "...complete statement of the crime. ..." and "...the circumstances or such crime. ..." (Section 15-22-25; Code of Alabama, 1975, Appendix "C"):

At the time of the parole the Board knew that Respondent Ellard had killed Charlotte Parks and attempted to kill Nancy Conn by beating them with a heavy instrument. The Board's knowledge of possible sexual impropriety by Ellard consisted in the statement "...Ellard admits having sexual intercourse with this girl [i.e. Mrs. Parks]..." (Appendix "E", page 107) and a passing reference in a copy of a report to the Georgia Parole Board, relating to Ellard's Georgia murder, that Ellard had "...abducted two

victims in Alabama and had raped each victim before murdering one and attempting to murder the other. ..." (See Ellard v. Board, 824 F.2d 937, 949 [11th Cir., 1987]; Appendix "B", page 67) However, the Board did not know:

1. That Ellard had abducted the women at about 1:00 a.m. and from then until well into the daylight hours, he repeatedly raped Mrs. Parks, forcibly sodomized both women, and forced them to perform sex acts on each other. (Appendix "E", pages 124-127)

2. That Ellard first tried to murder the the women by asphyxiating them with automobile exhaust fumes in the trunk of his car. (Ibid, page 128)

3. That Ellard had permanetly maimed Mrs. Conn by severing her fingers and blinding her in one eye. (Ibid, pages 128-129)

4. That in addition to beating her, Ellard had stabbed Mrs. Parks some fifty-eight times. (Ibid, page 130)

5. That Ellard had mutilated the body of Mrs. Parks by pulling almost all of her long blond hair out by the roots, after beating and stabbing her. (Ibid)

B. Under the Board's duty to obtain available reports of the prisoner's, "...mental and psychiatric condition and history..." (§ 15-22-25, Appendix "C"): The Board did not have any such reports before it at the time of the parole. However, the State mental hospital had examined Ellard prior to his sentence in 1971 and produced a report indicating a strong and growing desire for violent sexual activites. The report states:

> "... He (Ellard) does say that he feels he has to perform more daring acts in order to get this feeling (the feeling in his stomack and chest) and that

he is afraid of what he might do if he had another chance'. ..." (Appendix E, page 132)

This report was avilable at the time of the parole. (Ibid, page 131)

c. Under the Board's duty to obtain a "...complete criminal record of such prisoner. ..." (§ 15-22-25, Appendix "C"):

The Board knew that Ellard had murdered and raped Mrs. Parks and attempted to murder Mrs. Conn, that he had abducted a female university student in Birmingham, had taken her to Georgia and murdered her in 1971, and that he had escaped from prison in 1977. However, the Board did not know:

1. That while awaiting trial in 1971, Ellard had offered a fellow prisoner $500.00 to kill Mrs. Conn, the surviving prosecuting witness. (Appendix "E", page 142)

2. That while awaiting trial in 1971, Ellard had escaped from the county jail. (Ibid, page 143)

3. While on escape in 1977, Ellard procured a pistol, attempted to highjack a truck, stole a car, and attempted to cash a stolen government check. (Ibid, pages 133-135)

## SUMMARY OF THE ARGUMENT

1. A common practice among the states is to use parole to transfer prisoners, who are under sentence in other jurisdictions, to such other jurisdictions. There are many advantages to this arrangement for prisons, parole boards and prisoners. However, if such prisoners obtain a liberty interest in such paroles, the paroles could not be reviewed without meeting due process requirements, which would mean transfer-

ring prisoners from state to state. Therefore, the question of liberty interest in an interstate prison transfer by parole is of great importance. Although this Honorable Court has never had occasion to address this issue, this Courts' decisions clearly demonstrate that liberty interest is a not matter of form as held by the Court of Appeals, but a matter of substance. Compare Morrissey v. Brewer, (408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 [1972]) with Jago v. Van Curen, (454 U.S. 14, 70 L.Ed.2d 13, 102 S.Ct. 31 [1981]). The definition of liberty interest as set out in Morrisey v. Brewer (408 U.S. 471, 477 and 481-482, 33 L.Ed. 484, 492 and 494-495), includes no factors relevent to interstate prison transfers. This Honorable Court has consistently refused to find anything of constitutional significance in inter-

state prison transfers. E.g., Olim v. Wakinekona, 461 U.S. 238, 75 L.Ed.2d 813, 103 S.Ct. 1741 (1983) There is simply no liberty interest created by a parole which does not effect a prisoner's release to the free world. Jago v. Van Curen, above.

Given the importance of this issue and the inconsistency between the decision of the Court of Appeals and those of this Honorable Court, the writ should issue.

2. The power of the states to interpret their own laws has been a keystone to federalism for two hundred years. Concern for federalism, as well as concern for avoiding divergent interpretations of laws, has led to a universal policy of respecting the interpertation placed on a jurisdiction's laws by the courts of that jurisdiction.

Parole is a creature of state law. While recognizing this, the Court of Appeals ruled that once a state created any right called "parole," it had exhausted its descretion in the matter. The nature of parole, the validity of a given parole and whether it vested in a person are all matters of Federal Constitutional law, according to the Court of Appeals. In so ruling, the Court of Appeals ruled contrary to the controlling authorities of this Honorable Court on the effect of state law on the nature of parole. E.g., Greenholtz v. Inmates, 442 U.S. 1, 60 L.Ed.2d 668, 99 St.Ct. 2100 (1979); Connecticut v. Dumschat, 452 U.S. 458, 69 L.Ed.2d 158, 101 S.Ct. 2460 (1981) In rejecting the State Court interpretations of Alabama's parole statutes, the Court of Appeals ruled contrary to a two-hundred year old

policy of this Honorable Court, holding that State Court interpretations of state statutes are binding on the Federal Courts. E.G., Posadas de P.R. Asso. V. Tourism Co. P.R. 478 U.S. ____, 92 L.Ed.2d 266, 279, 106 S.Ct. 2968, 2975-2976 (1986) The writ should issue to review the Court's action.

## ARGUMENT

### I.

DOES A PAROLE WHICH MERELY TRANSFERS A CONVICT-PRISONER FROM ONE STATE'S PRISONS TO ANOTHER STATE'S PRISONS CREATE A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST?

A NOVEL QUESTION DECIDED INCONSISTENTLY WITH PRIOR DECISIONS OF THIS HONORABLE COURT.

This is an extremely important question for the federal and state parole

and prison authorities, for prisoners under sentences in different jurisdictions and for the public, which is extremely concerned about crimes committed by paroled prisoners.[5] It is not at all unusual for a convict to be under charges or sentences from several different jurisdictions. There are various ways that such convicts can be made available to another jurisdiction for trial or service of sentence, but there are several advantages, to both governments

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[5]One indication of public concern over parole is the growing number of law suits brought by victims of parolees against parole authorities. See, for example, Martinez v. California, 444 U.S. 277, 62 L.Ed.2d 481, 100 S.Ct. 553 (1980); Payton v. United States, 679 F.2d 475 (5th Cir, Unit "B", 1982); Sellers v. Thompson, 452 So.2d 460 (Ala, 1984); and Taitt v. United States, 770 F.2d 890 (10th Cir, 1985).

and prisoners, in doing this by parole. These advantes grow out of the fact that a parolee, whether released to the free world or transferred to another prison, continues to serve his sentence. Thus, where a state paroles a prisoner to another state's detainer, the prisoner continues to serve the first state's sentence, while burdening neither the prison facilities nor the parole apparatus of that state. From the prisoner's point of view, such an arrangement can be advantagous in various ways.[6] If such interstate prisoner

[6]It is difficult to identify what advantages accrued to Respondent Ellard as a result of the parole. His Georgia life sentence is concurrent with his Alabama life sentence. His rate of service before the parole, during the parole and after its nullification was the same. The parole only affected the place of service, which remains the same after the nullification of the parole.

transfers by parole create liberty interests in the prisoners, then, if the need arises to review a parole, the parolee would have to be accorded procedural due process. Morrissey v. Brewer, 408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972). This would mean transporting the prisoner from one state to another, perhaps a considerable distance. Laying aside the cost of such transportation, there would be considerable risk of escape by the convict. These concerns would make the the states hesitant to use parole for interstate prison transfers.

While this question is novel, in that this Honorable Court has never had occasion to address the liberty interest issue in the context of an interstate prison transfer by parole, this Honorable

Court's decisions clearly show that such paroles create no liberty interest. This was the conclusion reached by the State Courts and the District Court. Finding no liberty interest, the District Court declined to review the procedures by which Respondent Ellard's parole was nullified.

The Court of Appeals held that liberty interest is a matter of form. The Court expressly so held at 829 F.2d 937, 942-943 (Appendix "B", pages 37-38), and throughout the opinion the language shows an understanding that "parole" means "liberty interest." Yet, this Honorable Court's cases on liberty interest have involved a variety of processes, including commutation,[7] good

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[7]Connecticut v. Dumschat, 452 U.S. 458, 69 L.Ed.2d 158, 101 S.Ct. 2460 (1981).

time,[8] parole[9] and probation.[10] In none of these cases did this Court pay the slightest attention to the name given to the process. The liberty interest issue rose or fell, not on words or form but on substance, i.e., what was intended to be accomplished and what was accomplished. This point is best illustrated by comparing Morrissey v. Brewer, (408 U.S.

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[8]Wolff v. McDonnell, 418 U.S. 539, 41 L.Ed.2d 935, 94 S.Ct. 2963 (1974).

[9]Morrissey v. Brewer, 408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972); Greenholtz v. Nebraska, 442 U.S. 1, 60 L.Ed.2d 668, 99 S.Ct. 2100 (1979); Jago v. Van Curen, 454 U.S. 14, 70 L.Ed.2d 13, 102 S.Ct. 31 (1981); Board of Paroles v. Allen, 482 U.S.___, 96 L.Ed.2d 303, 107 S.Ct. 2415 (1987).

[10]Gagon v. Scarpelli, 411 U.S. 778, 36 L.Ed.2d 656, 93 S.Ct. 1756 (1973); Douglas v. Buder, 412 U.S. 430, 37 L.Ed.2d 52, 93 S.Ct. 2199 (1973); Bearden v. Georgia, 461 U.S. 660, 76 L.Ed.2d 221, 103 S.Ct. 2064 (1983).

471, 33 L.Ed.2d 484, 92 S.Ct. 2593 [1972]) with Jago v. Van Curen, (454 U.S. 14, 70 L.Ed.2d 13, 102 S.Ct. 31 [1981]). Morrissey and Van Curen received processes with the same name: "parole". The purpose of the paroles was the same: To conditionally release the respective parolees to the free world. If liberty interest arises out of form, either both Morrissey and Van Curen had liberty interests or neither had a liberty interest. Yet, this Court found a liberty interest in Morrissey but none in Van Curen. Why? Morrissey's parole was put into effect, and he was actually released to the free world, but Van Curen's parole was rescinded before he was actually released. In Jago v. Van Curen, above, this Honorable Court held that until and unless the parolee is

actually conditionally released to the free world, there is no liberty interest. Liberty interest is a matter of substance, not form.

The Court of Appeals also found that the instant parole created a liberty interest, because the Alabama Supreme Court held that Ellard had the right to due process incident to the nullifcation. See note 4, page 14-15, above. This analysis is the exact reverse of the analysis followed by this Honorable Court in case after case. This Court has always found due process rights flowing from liberty interest, not vice versa.

The Court of Appeals refused to follow this Honorable Court's teaching in Jago v. Van Curen, above, because under the parole, Ellard was released from the physical custody of Alabama's prisons

in order to enter Georgia's prisons. See note 4, 824 F.2d 937, 943; Appendix "B", page 40. The question is then, whether a liberty interest comes into being when a paroled prisoner is released from prison or when such a prisoner enters the free world. In a parole to the free world, this issue would normally be moot, since the two events occur simultaneously, but this is not the case with a parole to a detainer.

What is the nature of liberty interest, in the case of parole? In Morrissey v. Brewer, above, this Honorable Court discussed this point at some length. Morrissey involved a parole to the free world. In discussing the purpose of such a parole, this Court wrote:

> "...[Parole's] purpose is to help individuals reintegrate

> into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed...." (408 U.S. 471, 477, 33 L.Ed.2d 484, 492).

The obvious purpose of a parole to a detainer is to transfer a prisoner to another prison. On the nature of a parole to the free world this Court wrote,

> "...The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence...." (Ibid.)

Notice, it is the release from prison, generally, not the release from a particular prison. On the nature of the constitutionally protected interest created by a parole to the free world (i.e., liberty interest), this Court wrote:

> "...We turn to an examination of the nature of the interest of the parolee in his continued

liberty. The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison... He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation... The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. In many cases, the parolee faces lengthy incarceration if his parole is revoked...." (408 U.S. 471, 481-482, 33 L.Ed.2d 484, 494-495); emphasis supplied)

Obviously, not one consideration mentioned by this Honorable Court has the slightest relevance to a prisoner who is paroled from one state's prisons to another state's prisons. If liberty interest is a matter of substance, then its substance is release into society, not release from one prison to another.

The substance of a parole from one state's prisons to another is an interstate prison transfer. This Honorable Court has consistently rejected suggestions of constitutional rights in prisoners arising out of inter-state prison transfers. E.g., Olim v. Wakinekona, 461 U.S. 238, 75 L.Ed.2d 813, 103 S.Ct. 1741 (1983); Ponzi v. Fesseadea, 258 U.S. 254, 66 L.Ed. 607, 42 S.Ct. 309, 22 A.L.R. 879 (1922). If liberty interest is a matter of substance, then no such interest arises

from a parole which simply transfers a prisoner from one state's prisons to those of another state.

The case which comes closest on the level of substance to the instant case is the one which the State Courts and the District Court followed but which the Court of Appeals refused to follow: Jaqo v. Van Curen, above. The parole in Jaqo was to the free world, like that in Morrissey, rather than to another state's prisons, but this Honorable Court rejected the parolee's claim to a hearing incident to a nullifcation of his parole. The reason for the rejection was that the parolee was never actually released to the free world. Like the parolee in Jaqo, Respondent Ellard never reached the free world under the instant parole and

therefore, he never obtained a liberty interest.

Given the wide spread use of parole for interstate prison transfers, the question of whether such paroles create liberty interest will have to be addressed at some point. The Eleventh Circuit has addressed it in this case and decided it in a manner which is in irreconcilable conflict with this Honorable Court's decisions and opinions on both liberty interest and interstate prison transfers. The issue is clearly presented in this case on the basis of undisputed facts. It is respectfully submitted that in the interests of constitutional uniformity and certainty, the writ should issue in this case to review this novel question.

## II.
## THE VALIDITY OF A STATE PAROLE IS A STATE LAW QUESTION.

## THE DECISION AND OPINION OF THE ELEVENTH CIRCUIT CONFLICTS WITH THE CONTROLING DECISIONS OF THIS HONORABLE COURT.

The basic issue here is: To what extent do state parole statutes, as authoritatively construed by state courts, control the nature of parole rights and the validity of the granting of such rights? The importance of this issue is obvious. Federalism has been the keystone to American Constitutional Law for two hundred years. If the States have no say over the meaning of their laws, there is little or nothing of federalism left. Beyond the concerns for constitutional form, there is the obvious problem of divergent interpretations of state statutes. The Eleventh Circuit ruled that "...the construction of a

state's laws by its own Courts may be of benefit...." (824 F.2d 937, 944; Appendix "B", page 43), but state agencies and officials need more than help in understanding the laws under which they operate and which they enforce--they need to know precisely what are their authority, duties, and responsibilities. This need is just as great in the case of citizens. Unless state court interpretations of state laws are authoritative, they are little more than traps for those who rely on them. In recognition of these concerns this Honorable Court, the highest judicial authority in the nation, has consistently held itself bound by state court interpretations of state law; the federal circuits and other courts have, in applying the laws of other jurisdictions, looked to the judicial determinations of those jurisdictions for the proper

interpretation,and Congress has limited federal habeas corpus actions by state prisoners, such as the instant proceeding, to applications: "...on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States...." 28 U.S.C. Section 2254(a).[11]

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[11]This statute has been universally held to bar federal review of state court interpretations and applications of state law. E.g., Engle v. Isaac, 456 U.S. 107, 119, 71 L.Ed.2d 783, 795, 102 S.Ct. 1558 (1982); Mendiola v. Estelle, 635 F.2d 487, 489 (5th Cir, 1981); Grace v. Butterworth, 635 F.2d 1, 4 (1st Cir, 1980); Coombs v. Tennessee, 530 F.2d 695, 698 (6th Cir. 1976); cert. den., 425 U.S. 954, 48 L.Ed.2d 198, 96 S.Ct. 1731. Bond v. Oklahoma, 546 F.2d 1369, 1377 (10th Cir, 1976). However, in the Eleventh Circuit's view, the meaning and application of state parole statutes is a federal question. See also Coleman v. Alabama, 827 F.2d. 1469 (11th Cir, 1987), holding that federal habeas corpus lies to vindicate a convict's alleged rights under a state youthful offender statute.

The law is clear and it was recognized by the Court of Appeals (Ellard v. Board, 824 F.2d 937, 941 [11th Cir, 1987] Appendix "B", page 31), that the Constitution does not create a right to parole. Connecticut v. Dumschat, 452 U.S. 458, 463-464, 69 L.Ed.2d 158, 164, 101 S.Ct. 2460 (1980); Greenholtz v. Inmates, 442 U.S. 1, 7, 60 L.Ed.2d 668, 675, 99 S.Ct. 2100 (1979). Parole is a creature of state law. Once a liberty interest has been created by state law and become vested in a person, the prohibitions of the Fourteenth Amendment come into play. Once a state creates a liberty interest, it may not practice invidious discrimination in granting or withholding the right. Once such a right vests in a person, he may not be deprived of the right without due process of law. This much is hornbook law.

However, which law, state or federal, controls the issues of whether the state law has created a right, the nature of the right created, the authority to grant the right to a person and whether or not the right has vested in a person? In most of the parole and liberty interest cases which have come before this Honorable Court, these issues were undisputed, but in the instant case these very issues have been the "bone of contention" through more than four years of litigation.

Eleventh Circuit ruled that once a state creates a right called "parole," the state's discretion in the matter is exhausted. The nature of the parole, the authority to issue a parole and the validity of a parole, all became matters of Federal Constitutional law. For example, the Alabama Legislature

created a special sort of parole, which allows Alabama prisoners, who are under sentence in other jurisdictions, to be paroled to such other jurisdictions, on condition that they be returned to Alabama, if they are released before the expiration of their Alabama sentences. Section 15-22-24(i); Appendix "C". However, the Eleventh Circuit rejected this (note 2, 824 F.2d 937, 945, Appendix "B", page 36) and ruled that, as a matter of federal law, the issuance of any parole amounts to a '...decision that the State's penological interests do not require [continued] imprisonment.' See Bearden v. Georgia,[12] 461 U.S. 669-70,

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[12] Bearden v. Georgia, (461 U.S. 660, 76 L.Ed.2d 221, 103 S.Ct. 2064 [1983]), involved probation (an alternative to imprisonment) not parole (a way of serving a prison sentence). Its relevance on this point to a parole to another state's prison is hard to see.

103 S.Ct. at 2071...." (824 F.2d 937, 946 Appendix "B", page 53). Although the Eleventh Circuit agreed with the state courts that a void Alabama parole could be nullified,[13] the Court of Appeals found that, if the parole was valid, it could not be set aside for any reason, except a violation of a condition.[14] (824 F.2d 937, 945; Ibid, page 50). The Alabama statutes (Appendix "C") on their face place severe restraints on the granting of parole, and the state courts

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[13]This was one of the few points on which the Eleventh Circuit agreed with the State Courts.

[14]Strangely, immediately after the language quoted by the Eleventh Circuit from Bearden, as set out in the previous sentence we find: "...A probationer's failure to make reasonable efforts to repay his debt to society may indicate that this original determination [that the State's penological interest do not require imprisonment] needs reevaluation, and imprisonment may now be required to satisfy the State's interests...." (461 U.S. 660, 670, 76 L.Ed.2d 221, 231).

held that these provisions compelled the Board to review paroles, when it appeared that the parole statutes had been violated.[15] The Eleventh Circuit decided that what the state statutes really do is place severe restrains on nullifying void paroles. (824 F.2d 937, 942-943, Appendix "B", pages 41-42, citing the dissenting opinion in the Alabama Supreme Court as authority.) Finally, many of the gross deficiencies in information outlined in the Statement of the Facts, above, which the State Courts found violated the state statutory mandates, the Eleventh Circuit dismissed as mere

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15"...In fact, under such circumstances it would be the duty of the Board to do so. Mandamus would lie to compel it to act... A failure to act could subject the Board members to criminal sanctions...." (Ellard v. State, (474 So.2d 743, 752)

details. (824 F.2d 937, 948). Thus, the Eleventh Circuit Court of Appeals swept away one of the last vestiges of federalism--a state's sovereignty over the meaning of its own laws. In so ruling, the Court of Appeals, ruled contrary to inumerable prior decisions of this Honorable Court.

This Honorable Court has always looked to state law for authority on the nature of parole rights. Greenholtz v. Inmates, above; Connecticut v. Dumschat, above; Board v. Allen, 482 U.S.___, 96 L.Ed.2d 303, 107 S.Ct. 2415 (1987). These cases arose out of civil rights actions under 42 U.S.C. Section 1983, and there were no state cases construing the

state statutes.[16] However, in each of these cases this Court looked to the state statute, not the Federal Constitution, for the nature of the interest created.

In following state law on the nature of parole rights, this Honorable Court simply followed a broader policy, which it has consistently followed for two hundred years: That state court interpretations of state laws are binding on the federal courts. Rather than burden the record with a multitude of authorities on this well recognized point, we call the Court's attention to the following samples from the last

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16"...since respondents elected to litigate their due process claim in federal court, we are denied the benefit of the Nebraska courts' interpretation ...." (Greenholtz 442 U.S. 1, 12, 60 L.Ed.2d 668, 678).

twenty years: Posadas de P.R. Asso. v. Tourism Co. of P.R., 478 U.S.___, 92 L.Ed.2d 266, 279, 106 S.Ct. 2968, 2975-2976 (1986); New York v. Ferber, note 24, 458 U.S. 747, 769, 73 L.Ed.2d 1113, 1131-1132, 102 S.Ct. 3348 (1982); Illinois v. Vitale, 447 U.S. 410, 416 and 422, 65 L.Ed.2d 228, 236 and 239, 100 S.Ct. 2260 (1980); Adderly v. Florida, 385 U.S. 39, 46, 17 L.Ed.2d 149, 155, 87 S.Ct. 242 (1966). If this Honorable Court has no authority to revise state court interpretations of state law, as this Court has always held, how could the United States Court of Appeals have such authority?

Parole as noted above, is a matter of state law; but for state law, there would be no parole at all. The Court of Appeals' ruling that once a state has decided to create a right called

"parole", it has exhausted its discretion in the matter, is a radical and novel departure from prior authorities. In revising the state court interpretations of Alabama's parole statutes, the Eleventh Circuit ruled contrary to two hundred years of precedent and appointed itself the supreme parole authority for the states of the Circuit. As a result of the Eleventh Circuit's action, the citizens and state agencies and officials of the Southeastern United States have no idea what reliance, if any, to place on state court interpretations of state laws. If the Court of Appeals erred in this action, as we submit that it did, the writ should issue to correct the Court of Appeals' actions. If, on the other hand, the Court of Appeals decision is correct, then the writ should issue to clarify the matter and establish a new

national policy. If the Bicentennial of the United States Constitution is to be marked by abolishing the last remnants of federalism, it ought to be done on a nationwide scale and not limited to a few poor southern states in the Eleventh Circuit.

## CONCLUSION

In conclusion, the Petitioners respectfully submit that the decision and opinion of the United States Court of Appeals for the Eleventh Circuit, in finding a liberty interest in the Respondent, decided a novel question in a manner inconsistent with the controlling decisions of this Honorable Court and, in revising the state court interpretation of Alabama's parole statutes, ruled in direct conflict with two hundred years of precedent of this Honorable Court.

Therefore, the Petitioners pray that the writ issue to review the decision and opinion of the Honorable Court of Appeals.

Respectfully submitted,

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BY-

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## CERTIFICATE OF SERVICE

I, Joseph F. L. Marston, III, an Assistant Attorney General of Alabama, do hereby certify that I am a member of the Bar of the Supreme Court of the United States and, as one of the Attorneys for the Petitioners, I hereby certify on this _____day of November, 1987, I did serve the requisite number of copies of the foregoing on the Attorney for Richard Mark Ellard, Respondent, by mailing the same to said Attorney, first-class postage prepaid and addressed as follows:

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